Present: Bertram C.J. and Schneider J. 1922.

JAYASURIYA *v.* KOTALAWALA *et al.*

17—D. C. (Inty.) Kalutara, 6,373.

Defendant in prison—Default of appearance due to being deceived by plaintiff—Application to re-open judgment—Civil Procedure Code, s. 87—"Misfortune."

The defendant was in prison when he was sued on a bond. Being deceived by plaintiff he made no effort to appear in the action, and judgment was entered for plaintiff. He moved to re-open judgment.

Held, that his proper remedy was either to apply for *restitutio in integrum* or to seek damages for the fraud.

"The reason why the defendant did not appear in the action was not that he was prevented by misfortune, but that he was deceived and defrauded . . . . The fact that a man is deceived by fraudulent representations cannot be construed as a misfortune preventing him from appearing to show cause."

THE facts appear from the judgment.

J. S. Jayawardene, for the appellant.

Wijemanne, for the respondents.

March 30, 1922. BERTRAM C.J.—

This is a case in which the learned Judge refused an application that notice should issue upon the plaintiff in a mortgage action, who had recovered judgment in that action and was seeking to issue execution, to show cause why the judgment and decree should not be re-opened, and why the present appellant should not be allowed to file answer. It appears from a statement of the facts

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made to us by Mr. J. S. Jayawardene in this case that the appellant was in prison, and that while in prison he executed a mortgage bond, and while still in prison made default in appearance in an action on that bond. The reason why he made default was that he was deceived either by the plaintiff or by his son, and being so deceived he made no effort to appear in the action, though he might perfectly well have appeared and taken the necessary steps.

Mr. Jayawardene wishes us to say that these facts are within section 87 of the Civil Procedure Code, and that on these facts it ought to be held that his client was prevented from appearing to show cause in the District Court by reason of an accident or misfortune. It is no doubt the case that at the time in question the appellant was suffering from misfortune. It is also no doubt the case that that misfortune facilitated his being deceived. But the reason why he did not appear in the action was not that he was prevented by misfortune, but that he was deceived and defrauded by the person referred to. It does not appear to me that the facts come within the section, and I think that the learned Judge was perfectly right in ruling that the present appellant has misconceived his remedy. I will assume in the appellant's favour that, although the delay was considerable, there is a reasonable explanation for the delay. But that is not the real point on which the case turns. The fact that a man is deceived by fraudulent representations cannot be construed as a misfortune preventing him from appearing to show cause. His proper remedy is to apply either for *restitutio in integrum* or to seek damages for the fraud. Mr. Jayawardene asks us to say that the Court has an inherent power to set aside a decree issued *ex parte*. That may be so where the person against whom decree is entered has had no notice of the action. It does not apply where judgment is entered by default.

In my opinion the appeal must be dismissed, with costs.

SCHNEIDER J.—I agree.

Appeal dismissed.

H. R. COTTLE, GOVERNMENT PRINTER, COLOMBO, CEYLON.